Award No. 3680
Docket No. TE-3682

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Adolph E. Wenke, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

THE ALTON RAILROAD

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on The Alton Railroad,

(1) That the Carrier violated Rules 2, 3, 6 and 29 of the prevailing telegraphers' agreement and Notice and Order No. 1 and Notice of Instructions of Federal Manager C. H. Buford of Government Controlled Railroads of May 17, 1946, when on May 24 and 25, 1946, the Carrier declared abolished the positions of substantially all of the employes under the telegraphers' agreement because of the strike of the engineers and trainmen on these days, and has refused to pay these employes their wages for these two days on which they were improperly locked-out and suspended from work during their regular hours; and

(2) That each employe thus improperly deprived of his or her usual employment by the Carrier on the aforesaid two days—May 24 and 25, 1946—by being improperly locked-out and suspended during his or her regular hours and who was ready for service and not used, shall be reimbursed for the wage loss suffered on the two days as a result of this improper act of the Carrier.

EMPLOYES' STATEMENT OF FACTS: An agreement bearing date June 16, 1944, as to rates of pay and working conditions is in effect between The Order of Railroad Telegraphers and The Alton Railroad, parties to this dispute.

Due to a threatened strike of the engineers and trainmen on The Alton Railroad, the United States took possession and control of The Alton Railroad effective 4:00 o'clock P. M., May 17, 1946, by means of the following quoted Notice and Order No. 1:

"NOTICE AND ORDER NO. 1

"To each carrier by railroad named in the Executive Order of the President of the United States, dated May 17, 1946, concerning possession, control, and operation of certain railroads:

1. By order of the director of the Office of Defense Transportation, dated May 17, 1946, the authority vested in said director by Executive Order of the President of the United States, dated May 17, 1946, whereby possession and control of your transporta-

The former Six Day Per Week Agreement is now incorporated in the present schedule, effective June 16, 1944, as Rule No. 29, quoted in the foregoing, and the guarantee rule of the forme r Six Day Per Week Agreement is the next to the last paragraph of present Rule 29.

This claim of the second trick operator-towerman at Sherman for 1935 and 1936 was Case No. 3 in a docket of cases appealed to Vice President H. B. Voorhees and discussed by him at conference on April 9, 1936. The decision of Mr. Voorhees, which constituted settlement in this case, was set forth in Mr. Voorhees' letter of May, 1936, addressed to General Chairman E. E. Gentz, in the following language:

> "Case No. 3—Claim for pay for all working working days of the week at Sherman tower: Payment will be allowed for days other than Sundays and Holidays, for the days second trick position was discontinued, during the period involved."

As will be observed, the contention of the Employes in that case in respect to so-called guarantee was the guarantee applying to "regularly assigned employes," which guarantee is exactly the same as now stated in current agreement. The settlement in the prior Sherman case can have no bearing in the instant dispute because when a position is abolished, the employe who was regularly assigned to the position prior to its abolishment ceased to be a regularly assigned employe on the position. It will be seen from the above that the settlement in the prior Sherman case did not constitute any guarantee that no positions would be abolished. The guarantee rule under which the claim was prosecuted can have application only so long as an established position is continued and ceases to have application to a position which is abolished by proper notice.

It is pertinent for the Carrier to add at this point that all of the positions at the Sherman Tower were reduced to six day per week positions by bulletin reading as follows:

> "Effective May 3rd, 1936, Sherman telegraph office will be closed from 7:00 A.M. each Sunday, to 7:00 A.M. Monday."

No claim or protest was made in connection with the change made effective May 3, 1936, as it was recognized that the change was made in accordance with proper practice under the rules of the agreement.

Involved in this dispute is the inherent right of the Carrier to abolish positions and to reduce forces. Such right cannot be denied the Carrier when it is done not in violation of rules of agreement. Since the Employes admit that the positions involved were actually abolished, there remains nothing for your Board to decide except the alleged violation of the rules. The Carrier believes it has clearly proved that there was no violation of the rules involved in the abolishing of the positions. There is no support for the claim of the Employes under the rules, past practice or awards of your Board, and the claim should be denied.

Because this dispute is being submitted by the Employes ex parte to your Board, the Carrier is making this reply without knowledge of the alleged facts, contentions of other material which the Employes may set forth in their ex parte submission. Therefore, the Carrier reserves the right to submit such additional facts, evidence or argument as in the Carrier's judgment may be necessary in reply to the Employes' ex parte submission or to any subsequent oral argument or briefs submitted by the Employes to your Board.

OPINION OF BOARD: The controversy here involved arises out of a situation created when the locomotive engineers and trainmen went on a nationwide strike at 4:00 P. M. on May 23, 1946. This strike suspended all train and yard service and practically all of the operations of this and all other carriers. The strike terminated on May 25, 1946.

On May 23, 1946, at 8:30 P. M., the Chief Dispatcher on the Western Division of this Carrier notified all the employes on that division, which are

here involved, that on account of the suspension in service brought about by the strike effective that date, after certain assignments had been completed, all assignments were cancelled, except certain positions which are not material here. Likewise, on May 24, 1946, at 9:15 A. M. the Superintendent of the Eastern Division of this Carrier notified all of the employes on that division, which are here involved, that all positions were abolished immediately until normal operations are again resumed.

It is the thought of the General Committee that this Carrier was without authority to abolish these positions in view of the language used in "Notice and Order No. 1," dated May 17, 1946, issued by Charles H. Buford, Federal Manager of Government Controlled Railroads pursuant to an Executive Order of the same day, when construed in connection with a telegram to the Carrier of the same date. This Notice and Order gave the United States Government full possession and control of certain railroads, including this Carrier, and was issued for the purpose of seeking to avoid a national tie-up in railroad transportation.

If the question were here solely on these instruments it would present a nice issue, particularly in view of the language used in paragraph three of the Notice and Order. However, on May 24, 1946, Buford, the Federal Manager and person who issued the "Notice and Order No. 1" clarified this by his telegram to the Carrier wherein he stated: "In order to clear up the matter please be advised that such instructions do not require you to retain employes in service for whom you have no work. In reducing forces existing agreements should be followed." In view thereof it seems clear that the Carrier had such right if it existed prior to the taking over by the Government.

The strike, the duration of which could not be predetermined, completely suspended all work of the employes here involved. The Carrier can abolish a position when there is no longer any work to be performed. That the parties understood this right is evidenced by Rule 10-(a) of their effective agreement. The Carrier used language in the two telegrams the effect of which was to cancel and abolish the positions. However, the question remains, did the Carrier actually or in fact cancel or abolish the positions? If, as evidenced by its subsequent conduct, it is apparent that the Carrier did not actually consider the positions abolished, then the positions were, in fact, in existence and the employes regularly assigned thereto would be entitled to pay under Rule 29 paragraph nine of the effective agreement.

The Carrier, in its telegram of May 25, 1946, and which is hereinafter set out, referred to the positions as reestablished but it did not bulletin them, as is provided by Rule 8 of the effective agreement. It seeks to come under Rule 10-(g) of the agreement. This rule provides: "In the event a position is abolished and re-opened within 120 days, the employe who was holding the position abolished may return to it, provided he exercises such right within seven (7) days after the position is reestablished." This is the Rule the Superintendent of the Eastern Division called the employes' attention to in his telegram of May 24, 1946, when he abolished their positions.

At 6:55 A. M., on May 25, 1946, after the strike had been called off, the Superintendent of the Western Division notified all employes as follows: "Beginning with the next assignment after five P. M. today, May 25th, assignments are restored and each telegrapher will report for his next regular assignment."

In construing the effect of this telegram and whether the Carrier actually considered that it abolished these positions we must consider its correct statement that: "When a position is abolished no assignment on such position exists." Under this construction, if all positions had actually been abolished, no employe would have had a "next regular assignment" on which to report for duty. It was thus clearly indicated by the Carrier that it never actually considered these positions abolished but used this method of seeking to avoid paying these employes while the need for their services was temporarily suspended.

Nor did the telegram of May 25, 1946, extend to the employes the right to decide within seven days whether they wished to return to the positions which they formerly held when the same were restored within 120 days.

What the Carrier did was to direct these employes to report for their "next regular assignment" thereby clearly indicating they considered all of the jobs regularly filled by the men assigned thereto prior to the strike.

We therefore come to the conclusion that the Carrier, by its actions and conduct, never actually considered it had abolished these positions and we find in fact it had never done so. The incumbent employes were simply suspended and held in readiness, subject to call, to return to their positions. During this period they were regularly assigned employes to the positions and, under Rule 29, paragraph nine of the effective agreement, entitled to be paid.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Carrier has violated the rules of the effective agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 23rd day of October, 1947.